

# Exhibit 1



April 16, 2018

*Via email addresses indicated below*

**FREEDOM OF INFORMATION ACT REQUEST**

Clarice Julka or FOIA Officer  
Office of the Secretary  
Department of the Interior  
MS-7328, MIB  
1849 C Street NW  
Washington, DC 20240  
[os\\_foia@ios.doi.gov](mailto:os_foia@ios.doi.gov)

Ryan Witt or FOIA Officer  
Bureau of Land Management  
1849 C. Street NW, Rm 2134LM  
Washington, DC 20240  
[rwitt@blm.gov](mailto:rwitt@blm.gov)  
[blm\\_wo\\_foia@blm.gov](mailto:blm_wo_foia@blm.gov)

Lance Purvis or FOIA Officer  
Office of the Solicitor  
Department of the Interior  
MS-6429, MIB  
1849 C Street NW  
Washington, DC 20240  
[sol.foia@sol.doi.gov](mailto:sol.foia@sol.doi.gov)

Charles Smiroldo or FOIA Coordinator  
Department of Justice Environment and  
Natural Resources Division  
950 Pennsylvania Avenue NW  
Washington, DC 20530  
[FOIARouting.enrd@usdoj.gov](mailto:FOIARouting.enrd@usdoj.gov)

Bureau of Land Management  
Arizona State Office  
One North Central Avenue, Suite 800  
Phoenix, AZ 85004  
[BLM\\_AZ\\_FOIA@blm.gov](mailto:BLM_AZ_FOIA@blm.gov)

Chris Morley or FOIA Officer  
Office of the Field Solicitor  
Department of the Interior  
125 S. State Street, Suite 6201  
Salt Lake City, UT 84138  
[chris.morley@sol.doi.gov](mailto:chris.morley@sol.doi.gov)

*Re: Records Relating to Settlement Discussions or Proposals Concerning Federal  
Reserved Water Rights Associated with the San Pedro Riparian National  
Conservation Area*

Greetings:

This request concerns federal reserved water rights associated with the San Pedro Riparian National Conservation Area (SPRNCA), for which the Bureau of Land Management (BLM) has asserted claims in the ongoing Gila River Adjudication. *See In Re: The General Adjudication of All Rights to Use Water in the Gila River System and Source*, Civil Nos. W-1, W-2, W-3, and W-4 (Consolidated). When Congress created SPRNCA, it reserved water rights “sufficient to fulfill [its] purposes” and instructed the Secretary of the Interior to file a claim for quantification of that right in the appropriate stream adjudication. 16 U.S.C. § 460xx-1(d) (1988). BLM first filed a Statement of Claim for SPRNCA in 1989 and has filed amended federal water rights claims since then.

On behalf of Patricia Gerrodette and pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, we request the following:

**All records in the possession or control of the Department of the Interior (DOI), the DOI Office of the Solicitor, the BLM, and the Department of Justice Environment and Natural Resources Division (“the Agencies”) that comprise or relate to settlement discussions, or proposals to settle, federal reserved water rights asserted for SPRNCA in the Gila River Adjudication.**

In particular, these records include, but are not limited to, expressions of interest in the settlement of federal reserved water rights associated with SPRNCA, or records concerning such expressions of interest. Parties to the communications include, but are not limited to, representatives of claimants in the Gila River Adjudication, the Kyl Center for Water Policy or other policy institutions, non-governmental organizations, members of Congress, or state or local officials.

This request encompasses any communications created, modified, or received from January 1, 2012 through the date of this FOIA request.

The term “records” in this FOIA request includes, but is not limited to, letters, email messages, correspondence, maps, draft documents, photos, GIS or GPS data, hydrological data and studies, handwritten notes, meeting or phone conversation notes, and calendar entries generated, modified, or received by the Agencies.

Records relating to communications between the Agencies and their attorneys or representatives and other parties generated in the course of settlement negotiations or other discussions regarding the adjudication are not exempt from disclosure under FOIA. *See, e.g., NAACP Legal Def. & Educ. Fund v. U.S. Dep’t of Justice*, 612 F. Supp. 1143, 1146 (D.D.C. 1985) (rejecting argument that “a settlement negotiation privilege exists under [Federal Rule of Evidence 408]”). Records submitted to the Agencies by non-government parties “are not internal agency documents exempt from disclosure.” *Klamath Water Users Protective Ass’n v. DOI*, 189 F.3d 1034, 1038 (9th Cir. 1999).

If you assert that the records sought are not subject to FOIA, you must disclose any non-privileged portions of records containing withheld information. *See Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 267 (D.D.C. 2004) (holding that an agency “cannot withhold an entire document without describing the mix of privileged and non-privileged information and explaining why it would not be possible to simply redact the privileged materials”) (citing *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973); *Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977)); *see also Jordan v. U.S. Dep’t of Labor*, 273 F. Supp. 3d 214, 237 (D.D.C. 2017) (affirming agency’s “good-faith effort to segregate privileged and non-privileged information”).

### ***Background on FOIA***

Congress amended FOIA with the Openness Promotes Effectiveness in Our National (OPEN)

Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (codified at 5 U.S.C. § 552). In the Congressional findings to the OPEN Government Act, Congress found that “the American people firmly believe that our system of government must itself be governed by a presumption of openness.” Pub. L. No. 110-175 § 2(2). In addition, Congress found that “disclosure, not secrecy, is the dominant objective of [FOIA].” *Id.* § 2(4) (quoting *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)). Thus, under FOIA, there is a “strong presumption in favor of disclosure.” *Id.* § 2(3) (quoting *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991)).

In a March 19, 2009 memorandum to the heads of executive departments and agencies, Attorney General Eric Holder underscored that agencies should release records requested under FOIA even if the agency might have a technical excuse to withhold them:

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure.

Memo. of Attorney General E. Holder (March 19, 2009), *available at* <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

Further, federal courts have held that any record that leaves a federal government agency and goes to another party cannot be withheld under FOIA Exemption 5. *See* 5 U.S.C. § 552(b)(5) (2009); *see also Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977); *Senate of Puerto Rico v. Dep’t of Justice*, 823 F.2d 574, 587 (D.C. Cir. 1987); *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 6–7 (2001) (Exemption 5 applies only to “inter-agency or intra-agency” communication). Further, any comments from or to other agencies on the environmental impact of any proposed agency action may not be withheld as interagency documents. *See* 40 C.F.R. § 1506.6(f) (2009).

### ***Fee Waiver Request***

Gerrodette requests a fee waiver under 5 U.S.C. § 552(a)(4)(A), 43 C.F.R. §§ 2.45 & 2.48, and 28 C.F.R. § 16.10(k). A requester is entitled to a fee waiver when “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). BLM regulations at 43 C.F.R. §§ 2.45 & 2.48 and DOJ regulations at 28 C.F.R. § 16.10(k) mirror the FOIA statutory language.

First, release of the records described in this request will primarily benefit the public and substantially contribute to its understanding of the government’s policies and activities concerning management of the public lands and waters in the San Pedro River area, where federal reserved water rights are essential to maintaining the area’s physical and biological

integrity, and where pumping by residential and other developments is substantially depleting groundwater that is hydrologically connected to surface flows in the San Pedro River. Gerrodette intends to review and evaluate the requested information and, as appropriate, to disseminate this information to her partners in the nonprofit group Friends of the San Pedro River through publication on the group's website, newsletters, action alerts, public service announcements, tabling, and other grassroots outreach activities. If appropriate, Gerrodette will also make this information available to other groups concerned with protecting the public lands, wildlife, and waters at risk from depletion of federal reserved water rights. Gerrodette will also make available to the media newsworthy summaries of the requested documents, as well as newsworthy documents themselves. Release of the information may empower Gerrodette, or other citizens, to present comment on any subsequent developments in the ongoing Gila River Adjudication.

Release of the information will also empower members of the public to engage in public advocacy efforts to protect and conserve the federal public lands, wildlife, and waters at stake in the Gila River Adjudication and to more effectively evaluate the need for litigation or grassroots action. Gerrodette, as a citizen advocate for the environment, does not seek these documents for commercial use. Accordingly, we request that you grant a waiver of fees pursuant to 5 U.S.C. § 552(a)(4)(A), 43 C.F.R. §§ 2.45 & 2.48, and 28 C.F.R. § 16.10(k). We fully expect that such a waiver will be granted, as it has been in the past. However, if a waiver is not granted, please inform the undersigned of the cost of disclosing the above-described records if such fees exceed \$15.

### ***Additional Information Concerning Fee Waiver: Legal Background***

In 1974, Congress amended the judicial review section for fee waivers under FOIA, replacing the “arbitrary and capricious” threshold of review, by which courts are required to grant deference to agencies, with the more rigorous *de novo* review standard. *See* 5 U.S.C. § 552(a)(4)(A)(vii). The reason for this change is that Congress was concerned that agencies were using search and copying costs to prevent critical monitoring of their activities:

Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . . .

132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy).

FOIA's amended fee waiver provision was intended specifically to facilitate access to agency records by citizen watchdogs, which utilize FOIA to monitor and mount challenges to governmental activities. *See Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93–94 (D.C. Cir. 1986). Fee waivers are essential to such groups, which

rely heavily and frequently on FOIA and its fee waiver provision to conduct the

investigations that are essential to the performance of certain of their primary institutional activities—publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions . . . .

[The fee waiver] provision was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,” in a clear reference to requests from journalists, scholars and, *most importantly for our purposes, nonprofit public interest groups.*

*Id.* (quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (emphasis added)). Thus, one of the main goals of FOIA is to promote the active oversight roles of watchdog public advocacy groups, organizations that actively challenge agency actions and policies.

While Gerrodette makes this records request in her individual capacity, her advocacy serves the same ends as the institutional advocacy discussed in *Better Government Ass’n*, 780 F.2d at 94. The Sierra Vista Herald has described Gerrodette as the “conscience of the community on the San Pedro River” for more than two decades, “reminding decision-makers, developers and politicians at all levels of the consequences of their actions on the 56,000-acre national conservation area outside of Sierra Vista.” Eric Peterman, “Gerrodette takes on titans to protect the river, conservation area,” *Sierra Vista Herald* (Oct. 8, 2017), <https://goo.gl/S7Lxny>.

Public interest fee waivers are to be “liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sen. Leahy)). “[T]he presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public.” *Ettlinger*, 596 F. Supp. at 873 (quoting legislative history). An agency may not refuse a fee waiver when “there is nothing in the agency’s refusal of a fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefiting the general public.” *Id.* at 874 (quoting *Fitzgibbon v. CIA*, Civ. No. 76-700 (D.D.C. Jan. 10, 1977)). “Once the FOIA requester has made a sufficiently strong showing of meeting the public interest test of the statute, the burden, as in any FOIA proceeding, is on the agency to justify the denial of a requested fee waiver.” *Id.* (citing 5 U.S.C. § 552(a)(4)(B)).

In light of these principles and based on this FOIA request, Gerrodette—a citizen environmental advocate interested in oversight of BLM’s management of its natural resources, including federal reserved water rights—is entitled to a fee waiver for the documents requested. The factors identified in DOI’s regulations concerning fee waivers (43 C.F.R. §§ 2.45 & 2.48) are addressed more specifically below. The factors laid out in Department of Justice regulations at 28 C.F.R. § 16.10(k) are substantially similar to the DOI regulations, so they are not discussed separately.

***Whether disclosure of the requested information is likely to contribute to an understanding of specific government operations or activities (43 C.F.R. § 2.45(a)(1) & 43 C.F.R. §§ 2.45(a)(2)(i) & (ii))***

BLM regulations require that requesters seeking a fee waiver address:

- How the records concern the operations or activities of the Federal government (43 C.F.R. § 2.45(a)(1)); and
- How disclosure is likely to contribute to public understanding of those operations or activities, including
  - (i) How the contents of the records are meaningfully informative; and
  - (ii) The logical connection between the content of the records and the operations or activities (43 C.F.R. §§ 2.45(a)(2)(i) & (ii)).

The records Gerrodette seeks concern the operations or activities of the Federal government because they involve BLM's management of public resources, specifically the federal water rights reserved to fulfill the purposes of SPRNCA, and whether and how activities—including any settlement of claims in the Gila River Adjudication—may impact the resource values of those lands and waters.

Further, the informative value of the documents requested is high. The contents of the records Gerrodette seeks will shed light on BLM's actions and coordination on public lands management; the records will help meaningfully inform the public about agency dealings and considerations that otherwise would not be widely available to or disseminated to the public. Disputes over management of public resources and actions that could increase water withdrawals from the aquifer that supports the San Pedro River are of great public interest, drawing significant media coverage as well as litigation.

Gerrodette will use this information to better inform the public, legislators, and her conservation partners as to the potential for anticipated decisions to harm or benefit the San Pedro River ecosystem and the wildlife it supports, and to understand how BLM comprehends its duties to protect the resources of America's public lands at risk from the agency's proposed actions.

***Whether disclosure of the requested information will contribute to an understanding of the subject by the general public (43 C.F.R. §§ 2.48(a)(2)(iii)–(v))***

BLM regulations require that requesters seeking a fee waiver address:

- How disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject;
- The requester's expertise regarding the requested information and how the requester plans to disclose the information; and
- The requester's ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject.

Federal courts have held that public interest groups satisfy such requirements where requestors



show the “ability to understand and disseminate the information.” *Judicial Watch, Inc. v. Dep’t of Justice*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000) (“*Judicial Watch I*”). In addition, a description of past successful methods of informing the public combined with a “firm intent to disseminate” the information has been held to meet this test. *Judicial Watch, Inc. v. Dep’t of Justice*, 185 F. Supp. 2d 54, 59–60 (D.D.C. 2002) (“*Judicial Watch II*”) (quoting *Judicial Watch I*, 122 F. Supp. 2d at 13).

Gerrodette meets this test. First, the requested disclosures will enable her to provide information to the public at large as to BLM’s actions that could result in harm to the San Pedro River ecosystem. Gerrodette has expertise in communicating with the public and the media on issues related to the protection of wild lands, wildlife, and federal reserved water rights in Arizona. Media coverage attests to Gerrodette’s expertise in communicating with the media and the public on these important issues. See Peterman, *supra*, at 5; Gerrodette et al., “Governor’s Water Proposals Don’t Protect Arizona’s Rivers and Streams,” *Water Deeply* (Dec. 15, 2017), <https://goo.gl/JzWs9a>; Emily Bregel, “Wildlife service reversal bodes well for massive Benson development,” *Arizona Daily Star* (Nov. 26, 2017), <https://goo.gl/1xSL1d> (quoting Gerrodette on a policy reversal on critical habitat in SPRNCA by the U.S. Fish & Wildlife Service); Mark Armao, “Humans threaten health of San Pedro River,” *Arizona Sonora News* (Oct. 23, 2014), <https://goo.gl/mAQXuK> (quoting Gerrodette on water deficit in San Pedro River watershed); Carol Broeder, “Permits sought for surface water,” *Arizona Range News* (Mar. 9, 2016), <https://goo.gl/qVen7U> (quoting Gerrodette on water rights in Willcox Basin); Katie Caldwell & Ava Garcia, “New bill highlights conflict between development, water supply in San Pedro,” *Arizona Sonora News* (Mar. 30, 2018), <https://goo.gl/d6gXR8> (quoting Gerrodette on proposed legislation to loosen water requirements for new developments in rural counties).

Second, Gerrodette intends to publish summaries of newsworthy information sought here to the media as well as make the information available herself.

***Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities (43 C.F.R. § 2.48(a)(3))***

The legislative history of FOIA makes clear that the “significance” test is met where, as here, the information requested will support “public oversight of agency operations”:

A requester is likely to contribute significantly to the public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government.

132 Cong. Rec. H9464 (Reps. English and Kindness); *see also McClellan Ecological Seepage Situation*, 835 F.2d at 1284–86.

The requested records will support public oversight and significantly contribute to public understanding by allowing the public to better understand BLM’s actions, decisions, and interactions with those seeking to obtain water rights in the San Pedro River hydrologic system. The records sought will therefore support public oversight of BLM’s operations.



Debate and oversight of BLM's oversight and management of public lands and waters will be better informed by the release of the requested records, which, to our knowledge have never been divulged or presented to the public. The type of information sought—communications between the Agencies and parties expressing interest in settlement of federal reserved water rights associated with SPRNCA—is not routinely available to the public absent public records requests.

Further, courts in similar circumstances have held that agencies cannot deny a fee waiver on the basis that any of the requested information is reasonably available to the requester through means other than this FOIA request. *See Project on Military Procurement v. Dep't of the Navy*, 710 F. Supp. 362, 365–66 (D.D.C. 1989) (rejecting Navy's argument that overlapping information may be found in other Navy documents which other members of the public have; "the substantive contents of even a single document may substantially enrich the public domain and justify a fee waiver").

Thank you for your prompt attention to this request. We look forward to your response as soon as possible, but in no event any later than 20 days, as required by law. If you have any questions in this matter, please contact me at 303-996-9612.

Sincerely,

Alex Hardee  
Associate Attorney  
Earthjustice Rocky Mountain Office  
633 17<sup>th</sup> Street, Suite 1600  
Denver, CO 80202  
303-996-9612  
[ahardee@earthjustice.org](mailto:ahardee@earthjustice.org)